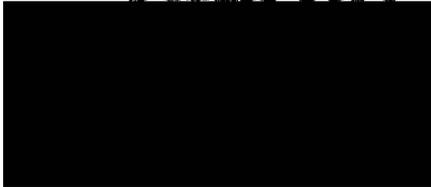




U.S. Citizenship
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Services

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DEC 22 2006

FILE: LIN 05 222 51154 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be denied.

The petitioner is a limited partnership initially registered in the State of Delaware on August 22, 2003 as a limited liability company and converted to a limited partnership on September 9, 2003. It seeks to employ the beneficiary as its Head of U.S. Trading and Lead U.S. Financial Engineer. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

On September 12, 2005, the director denied the petition determining that the record did not establish that the petitioner is a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii) or that the petitioner was a viable entity that would employ the beneficiary in a specialty occupation as of the filing date of the petition.

On appeal, counsel for the petitioner asserts that it is a viable company and that the proffered position existed when the petition was filed. Counsel submits a brief and additional documentation.

The issue in this matter is whether the petitioner was doing business when the petition was filed and thus had a specialty occupation position available for the proposed H-1B beneficiary when the petition was filed.

The record includes: (1) the July 20, 2005 Form I-129; (2) the director's July 22, 2005 request for further evidence (RFE); (3) counsel for the petitioner's August 29, 2005 response to the director's RFE; (4) the director's September 8, 2005 denial letter; and (5) counsel's brief and supporting documentation. The AAO considered the evidence in its entirety before rendering its decision.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

In the July 1, 2005 letter appended to the petition, the petitioner indicated that it had been incorporated in 2003 and was part of Mako Global Derivatives Executives LLC, an organization that employed 100 personnel and "enjoys an annual turnover in the region of approximately \$98,000,000 in 2004."

On July 22, 2005 the director requested evidence of the petitioner's ongoing business, an organizational chart listing the petitioner's employees, and the petitioner's 2004 United States Income Tax Return (Form 1065) along with all supplemental pages.

In an August 29, 2005 response, the petitioner attached the federal income tax return Form 1065 for the 2003 year that had been filed by Mako Executive LLC, the petitioner's claimed parent company, as well as a draft 2003 Form IL-1065 for the claimed parent company, both with Tax ID number 98-0349567. Counsel noted that the petitioner had yet to finalize the filing of its 2004 federal income tax return.

The petitioner provided its agreement of limited partnership showing Mako Global Derivatives Executives LLC as the limited partner holding a 99.99 percent interest in the partnership and Pioneer Consulting Services, LLC as the limited partner holding a .01 percent interest in the partnership. The petitioner also provided its certificate of limited partnership filed in the State of Delaware on September 9, 2003; the certificate of conversion showing the conversion of the limited liability company created August 22, 2003 to the limited partnership; a business checking account statement for October, November, and December 2003; a statement of trades for trades occurring through January 2004 for an account number U 80009 2381180 and Tax ID number as 42-1608897; a daily statement for January 5, 2004 for account number U 80009 23381180 and Tax ID number 20-0175340; and a financial statement for the year ended December 31, 2004 with report of independent auditor. The independent auditor noted that the partnership had temporarily ceased its business and trading activities and that "[t]he operations of the partnership will be included in the taxable income of the partners and, accordingly, no provision for Federal state or local income taxes is recorded in the financial statements."

On September 8, 2005, the director denied the petition determining: that the petitioner had failed to submit evidence demonstrating that it was an active business entity in the State of Illinois and had authority from the State of Illinois to conduct business operations when the petition was filed; that the petitioner had not established it was an employer as defined at 8 C.F.R. § 214.2(h)(4)(ii) and thus could not maintain an employer-employee relationship with the beneficiary; that the petitioner had provided a statement in regard to its 2004 federal tax return that was inconsistent with the independent auditor's statement; and that the 2003 Form 1065 appeared to be for a related entity and not for the petitioner. The director, upon review of the totality of the record, determined that the petitioner was not a viable entity in a position to offer employment to the beneficiary.

On appeal, counsel for the petitioner asserts that the proffered position is a specialty occupation, that the position existed at the time the petition was filed, and that the petitioner was a viable entity when the petition was filed. Counsel submits the minutes of the petitioner's executive management meeting on March 18, 2005 wherein the Global Chief Operating Officer, the Global Chief Finance Officer, and the Global Chief Executive Officer "confirmed that the Board would reverse an earlier decision to wind down and cease the business operation of [the petitioner];" and "that trading activity would recommence, including the use of managed account set-ups, through [the petitioner] immediately, beginning with the set up of Thor Capital Management LLC." Counsel also submits a one page profit & loss – August 2005 year-to-date statement that identifies the petitioner by name at the top of the page. Counsel further submits an October 7, 2005 letter from the director of ABN AMRO Incorporated, a registered broker/dealer and futures commission merchant that indicates it provides clearing and execution services to the petitioner and that the petitioner is a client in good standing. Counsel asserts that the petitioner continues to confer with the State of Illinois to ensure that the petitioner is fully compliant with registration requirements. Counsel concludes that because the proffered position is a specialty occupation, because the petitioner was viable when the petition was filed and continues

to be an ongoing concern, and because the position was and continues to be a bona fide job opportunity, the petition should be approved.

The AAO finds that the petitioner has presented confusing and inconsistent evidence regarding the ongoing nature of its business when the petition was filed in July 2005. First, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO does not find consistent evidence of the petitioner's Internal Revenue Service Tax identification number when the petition was filed. The AAO also finds that the petitioner has not presented documentary evidence of its relationship with entities that may or may not be filing federal and state tax returns on the petitioner's behalf. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO specifically finds that the three documents submitted on appeal are insufficient to establish that the petitioner would be the beneficiary's employer for the purposes of filing the Form I-129, Petition for a Nonimmigrant Worker. First, the March 18, 2005 minutes of the petitioner's executive management meeting were not provided in response to the director's RFE but were provided only after the director's note of the independent auditor's statement regarding the cessation of the petitioner's operations. A late submitted document such as this raises questions of credibility. Second, the record does not contain independent evidence that the individuals meeting had authority to recommence the petitioner's business operations. Third, the one page profit and loss statement is without context and thus is insufficient to establish the petitioner's operations. Likewise, the October 7, 2005 letter from the director of ABN AMRO Incorporated does not provide the detail necessary to establish the petitioner is in a position to offer a position to the beneficiary. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The petitioner was provided notice of the director's concerns on this issue in the director's July 22, 2005 RFE; however, the petitioner failed to adequately explain the inconsistencies and failed to provide evidence establishing that the petitioner was a viable entity that would employ the beneficiary in a specialty occupation when the petition was filed. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO will not address whether the petitioner has provided sufficient evidence to establish that the proffered position satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) as the petitioner has not established it will employ the beneficiary as a U.S. employer as of the filing date of the petition.

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.